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ABSTRACT

This article examines the effects of the "Acton" decision, a Supreme Court ruling that upheld random urinalysis of secondary-school students who participate in extracurricular athletics. The paper focuses on cases involving general (mass) searches, "medical assessment" searches, strip searches, and drug testing. Although the intent of the Court is to create a balance between individual rights secured by the Constitution and the need of the government to provide a safe and secure environment, the effect is a steady stream of decisions eroding students' Fourth Amendment rights (the right to be secure against unreasonable searches and seizure). The paper describes the events leading up to the "Acton" case, which involved random drug testing for student athletes, and the reasoning behind the Court's decision. It then recounts specific cases that shaped legal guidelines for various types of searches. It concludes that students' Fourth Amendment rights have been increasingly placed in the hands of school officials, who have been delegated the responsibility to provide for the safety and well-being of students. Even so, informed decision-making remains paramount in conducting student searches and practical considerations for school personnel are presented. (Contains 21 references.) (RJM)

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Student Search and Seizure: 1998 Update

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Student Search and Seizure: 1998 Update

Recent incidents of student violence such as those in Arkansas[1] (two students, aged 11 and 13, killed 4 people and wounded 10) and Oregon[2] (a 15-year-old student killed two people and injured 22) reinforce the call for school officials to step up anti-violence procedures. Implementing these procedures presents a challenge: the balance between individual rights and the need to promote and preserve safety is a delicate one. Although the scales are clearly tipped in their favor, educators and school administrators are well-advised to stay current in their knowledge of court decisions regarding Fourth Amendment search and seizure issues.

In 1969, the Supreme Court observed that it had "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[3] In 1985 the Court articulated the standard for school searches and seizures as "reasonableness,[4]" in that a search must be 1) justified at its inception, and 2) reasonable in scope. The Court further stated, "This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children."[5]

Since the precedent setting *T. L. O.* decision in 1985, courts have generally continued to uphold school conduct standards, weighing in on the side of school officials in court decisions. In 1995 the Supreme Court applied the "special needs" analysis to searches conducted by school officials. A warrantless search not requiring probable cause (and thus, not individualized reasonable suspicion) may be constitutional "when special needs, beyond the normal need for

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[1] Trends: School safety. (1998, Summer). *What's What in Education*, p. 8.
[2] *Id.*
[3] *Tinker v. Des Moines Independent Community School District*, 393 U. S. 503, 507 (1969).
[4] *New Jersey v. T. L. O.*, 469 U. S. 325 (1985).
[5] *Id.* at 342-343.

law enforcement, make the warrant and probable-cause requirement impracticable."[6] In *Vernonia School District 47J v. Acton*, the court elaborated on its standard of judging the "reasonableness" of random, suspicionless urinalysis drug testing of student-athletes by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[7] In *Acton*, the court held that the governmental interest was "important," if not compelling, enough to uphold random urinalysis of secondary school students as a condition of participation in extracurricular athletics.

The purpose of this article is to examine the effects of the *Acton* decision, particularly as it articulated the nature and immediacy of the governmental interest, on recent student search caselaw. Court decisions addressed will be primarily those following *Acton*, including, but not limited to, cases involving general (mass) searches,[8] "medical assessment" searches,[9] strip searches,[10] and drug testing.[11] The authors suggest that although the intent of the courts is to create a balance between individual rights secured by the Constitution and the need of the government to provide a safe and secure environment, the effect is a steady stream of decisions eroding students' Fourth Amendment rights.

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[6] *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995) (internal quotations omitted).

[7] *Id.* at 618 (internal quotations omitted).

[8] *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996). The court reasoned that a general (mass) search of students for knives to ascertain who had cut bus seats was "not unreasonable." Cigarettes and a match box that contained cocaine residue would have been in "plain view" had the student emptied his own coat pocket. *Smith v. McGlothlin*, 119 F.3d 786 (9th Cir. 1997), search was upheld on immunity grounds.

[9] *Bridgman v. New Trier High School District No. 203*, 128 F.3d 1146 (7th Cir. 1997), the court upheld an unsuccessful search of a high school student suspected by a certified drug addiction counselor as being under the influence of marijuana.

[10] *Jenkins v. Talledega City Board of Education*, 115 F.3d 821 (11th Cir. 1997), the court upheld a strip search of two 8-year-old second graders on the grounds of qualified immunity; the Supreme Court refused to hear the case.

[11] *Todd v. Rush*, 133 F.3d 984 (7th Cir. 1998), the court upheld a school policy that called for random, unannounced urinalysis examinations for drugs, alcohol or tobacco of high school students participating in any extracurricular activities or driving to and from school; due to the suspicionless nature of the test, students who failed a test were not subject to school discipline.

The Fourth Amendment

The Fourth Amendment guarantees individuals the right to be secure, providing protection against "unreasonable searches and seizures," setting a search standard of "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This right to a legitimate expectation of privacy extends to all persons, including school children, a right confirmed by the Court in *T. L. O.* That same Court, however, instituted the two-part test for determining the validity/legality of a student search: 1) Reasonable suspicion: Is the search justified at its inception? There must be ". . . reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[12] 2) Scope: Is the search reasonable in scope? The ". . . measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[13]

Although school officials do not need to obtain a search warrant, school officials act as representatives of the state,[14] thereby limiting the applicability of *in loco parentis*. Importantly, the court in *T.L.O.* did "not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."[15]

The *Acton* Case

Vernonia School District officials, concerned about student drug use and motivated by indications that student athletes were leaders in the drug culture, implemented a policy of random urinalysis drug testing of participants in the secondary school athletic program. All

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[12] *T.L.O.*, 469 U.S. at 342.
[13] *Id.*
[14] *Id.* at 336-337.
[15] *Id.* at 342, n. 8.

students who wanted to participate in the athletic program and their parents were required to provide written consent for the testing. At the beginning of each sport season, all students were tested; during the season, names of all participating students were placed in a weekly pool with 10% chosen at random for testing. Tested students completed a testing control form to inform testing officials of prescription medication they were taking.[16]

Procedures for boys included producing a specimen at the urinal with a monitor 12-15 feet away; girls produced a specimen in an enclosed stall with a monitor outside. The district could request lab tests for other drugs in addition to those done for amphetamines, cocaine, and marijuana; only the superintendent, principals, vice-principals, and athletic director had access to the results. If a student tested positive, a second test was administered as soon as possible. Negative results on the second test required no further action; positive results mandated parental notification and gave the student the option of: 1) participation for 6 weeks in an assistance program with weekly urinalysis, or 2) suspension for the remainder of the current and for the next athletic season. Students who committed a second offense were *automatically* suspended for the remainder of the current season and for the next athletic season; a third offense resulted in automatic suspension for the remainder of the current season and the next *two* athletic seasons. Other than suspending the students from participation in athletic activities, school officials would take no disciplinary action when student drug tests were positive.

Seventh grader James Acton and his parents refused to sign the consent forms for the newly implemented student-athlete drug-testing program; as a result James was refused the right to participate in the Vernonia School's football program. James and his parents subsequently

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[16] *Acton*, 515 U.S. at 650, 569. Interestingly, the court expressed concern over the fact that students who were taking prescription medications were required to submit advanced notice to the testing agency. In fact, the court, for the sake of argument, acknowledged that such disclosure to school officials posed a "greater invasion of privacy"

filed suit, alleging that the policy violated the Fourth Amendment and the parallel provision of the Oregon constitution, and seeking declaratory and injunctive relief.

The U.S. Supreme Court upheld the Vernonia School District's policy of random urinalysis drug testing of secondary students who participated in interscholastic athletics. The Court first noted their previous holding that the state-compelled urine collection did constitute a search under the Fourth Amendment;[17] therefore, the search had to meet the reasonableness test. Reasonableness of a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[18] In this case, the nature of the concern (student drug use) was important--indeed, perhaps compelling.[19] The "special needs" of the public school context negated the requirement of *individualized* reasonable suspicion.

In its examination of the privacy interest, the Court noted the age of the students and the State's status as temporary custodian as important factors. "[T]he 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[20] Furthermore, by choosing to participate in a volunteer activity, students "subject themselves to a degree of regulation even higher than that imposed on students generally."[21]

With regard to the scope of the intrusion on individual privacy, the Court concluded that the invasion of privacy was not significant: the conditions for producing the urine specimens were nearly identical to those one would encounter in a public restroom.

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than did the disclosure to medical personnel responsible for conducting the search. Despite this acknowledgement, the court held that Acton was not entitled to rely on this argument in making his claim.

[17] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989).

[18] *Acton*, 515 U.S. at 652-653.

[19] *Id.* at 661.

[20] *Id.* at 656.

[21] *Id.* at 657.

The Court reasoned that the involvement of athletes in the increased drug use justified the policy. The drug use, more pronounced during the school year, affected the entire student body; however, the risk of immediate physical harm was greater during participation in athletic activity. Schools owe a special duty of care to students involved in school sponsored athletic activities.

Although the Court has upheld suspicionless searches, the Fourth Amendment imposes no irreducible requirement of individualized suspicion. In her dissent to *Acton*, Justice O'Connor reiterated the concern she expressed in *Illinois v. Krull*: "Blanket searches, because they can involve 'thousands or millions' of searches, 'pos[e] a greater threat to liberty' than do suspicion based ones, which 'affec[t] one person at a time.'"[22] Pointing out that "it is not open to judges or government officials to decide on policy ground" whether a mass search or a suspicionless search is better, Justice O'Connor further stated that "in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken . . . what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority."[23]

General (Mass) Searches

Thompson v. Carthage School District[24]

To date, three federal circuits have upheld variations of general or mass searches. In the 1996 case of *Thompson v. Carthage School District*, the 8th Circuit Court upheld a mass search conducted to search for guns and knives that revealed crack cocaine in the coat pocket of a

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[22] *Id.* at 667 (O'CONNOR, J., dissenting, internal quotation from *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O'CONNOR, J., dissenting).
[23] *Id.* at 669.
[24] 87 F.3d 979 (8th Cir. 1996)

student. Informed of fresh cuts on the seats of a school bus, the high school principal became concerned about the presence of a knife or other weapon on school grounds. Subsequently, all male students grades six to twelve were searched. During the search, the principal was told that someone had a gun at school that morning.

The school principal and a teacher conducted the search; students removed their jackets, shoes, and socks, emptied their pockets, and placed the items on a large table. A metal detector was then used to check for concealed weapons; if the detector sounded, a pat down was conducted. The coats students removed were also patted down. The coat of a student in one of the last classes searched held items considered contraband: a cigarette package, a used book of matches, and a matchbox. The matchbox held a white substance determined to be crack cocaine. The owner of the coat was expelled from school for the remainder of the school year; he and his guardian brought suit, contending that the search violated the Fourth Amendment.

The court first dealt with the issue of the applicability of the Exclusionary Rule. Stating that school officials "do not have an adversarial relationship with students,"[25] and that "children's legitimate expectations of privacy are somewhat limited at school,"[26] the Court concluded, "[T]he exclusionary rule may not be applied to prevent school officials from disciplining students based upon the fruits of a search conducted on school grounds."[27] Although the Court did not consider whether the evidence found in the search could be used in criminal proceedings, it did determine that the evidence could be used in school disciplinary proceedings.

Acknowledging that the court in *T.L.O.* left open the issue of individualized suspicion as a requirement for school searches, the court noted that the recent *Acton* decision clarified the issue. Individualized suspicion is *not* always required for school searches. The Court saw the

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[25] *Id.* at 981.
[26] *Id.*

two reports of weapons in the *Thompson* case as providing reasonable suspicion for the principal to believe there was a risk to student safety and school discipline. Whether the student or the teacher removed items from the students' pockets was not deemed to be constitutionally significant. The court concluded that the search conducted by the Carthage school officials met the criteria set by *T.L.O.* and *Vernonia*.

Smith v. McGlothlin[28]

In 1997, the 9th Circuit Court upheld a search of an entire group of roughly 20 high school students suspected of smoking. The search, ordered by the high school vice-principal, resulted in the discovery that a sixteen-year-old female student had in her possession three knives: a double-edged dagger with a 4-inch blade, a folding knife with a 3-inch blade, and a smaller folding knife. The juvenile court judge suppressed this evidence, and charges against the student were dismissed. She then filed action against the vice-principal alleging that the search required individualized suspicion, and that it was conducted in an unreasonable manner.

The 9th Circuit Court of Appeals affirmed the district court ruling that the vice-principal was entitled to qualified immunity and that the search was reasonable. The court referenced both *T.L.O.* and *Acton* in pointing out that the student was likely *not* entitled to individualized suspicion before being searched. The court specifically noted that it was not required to rule on the reasonableness of the search; rather it held that the assistant principal was qualifiedly immune under § 1983 because the law providing that the student plaintiff was entitled to an administrative showing of individualized suspicion as a prerequisite to the search was not clearly established at the time of the search. The court did, however, rely on both *T.L.O.* and *Acton* in

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[27] *Id.* at 982.
[28] 119 F.3d 786 (9th Cir. 1997).

concluding, ". . . it is fairly clear that Smith was not in fact entitled to individualized suspicion..."[29]

DesRoches v. Caprio[30]

This controversy arose after the dean of students at a Virginia high school conducted a general search of 19 students to look for a student's missing tennis shoes. All 19 students were members of an art class split into halves by a lunch period. Following the lunch break, a female student discovered that her tennis shoes were missing. The art teacher testified to spending a brief period of time in a classroom closet cutting paper; thus, she was unable to observe events in her unlocked room during the entire lunch period. After the student notified the dean of students about the missing shoes, the dean declared his intent to search the class members and inquired as to students' objections. After two students objected, the dean reminded the students of the school's policy that called for a 10-day suspension for students refusing to consent. One student still refused to consent. Subsequent searches of the 18 "consenting" students' backpacks turned up no evidence of the sneakers. The dean escorted the non-consenting student to the office of the principal, who also tried to gain the student's consent. The student again refused and was immediately suspended for 10 days.[31]

The student, through his father, sued the school district and the dean of students under §1983, alleging violations of the First, Fourth, and Fourteenth Amendments, seeking declaratory and injunctive relief, and monetary damages. The federal district court[32] dismissed the First and Fourteenth Amendment claims; held that 11th Amendment immunity precluded monetary damages against the school board and superintendent; and ruled that the search was not

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[29] *Id.* at 788.
[30] 1998 U.S. App. LEXIS 23361 (4th Cir. (Va.)).
[31] *Id.* at *5. The student was readmitted pending court disposition.
[32] *DesRoches v. Caprio*, 974 F.Supp. 542 (E.D.Va. 1997).

reasonable, thereby ordering the school to delete any references to the student's' suspension. Finally, the court held that the principal was entitled to qualified immunity. In reaching this decision, the court relied on both the "reasonable suspicion" analysis articulated in *T.L.O.* and the "special needs" balancing analysis employed, *inter alia*, in *Acton* to determine that individualized suspicion was necessary to search the non-consenting student because the school's interest in recovering a pair of tennis shoes was not sufficient to overcome the student's legitimate expectation of privacy. To wit, "A search of all nineteen students in the class, especially when it is not certain that one of them is guilty, casts too wide a net when the evil combated is petty larceny of an object that could not harm others."[33]

Reversing the judgment of the district court, the 4th Circuit held that the "special needs" analysis did not apply, because in reality the dean of students conducted not one search of 19 students, but 19 individual searches with the reasonableness of each "independently assessed."[34] The court then embarked on the two-pronged *T.L.O.* analysis and held that the search's inception occurred not at the time when the dean announced his intent to search the entire class, but rather when the student was suspended for refusing to consent. Because the searches of the 18 consenting students were fruitless, the dean developed reasonable individualized suspicion of the non-consenting student, thus justifying the proposed search.[35] The court paid little attention to the issue of coercion, holding: "While we agree of course, that actual suspension for refusal to consent constitutes such an infringement when the proposed search is unreasonable, we cannot agree that the Fourth Amendment is implicated merely by a demand to search coupled with

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[33] *Id.* at 550.
[34] *DesRoches*, 1998 U.S. LEXIS at *18.
[35] Since the court upheld the search under the *TLO* standard, it declined to apply the "special needs" analysis. *See* 1998 U.S. LEXIS at *21, n. 3.

threats of punishment, where the threats are unsuccessful in bringing about the individual's consent."[36]

Metal Detector Searches

At least five court cases have addressed and upheld school districts' use of metal detectors, with either handheld or walk-through units. In 1992, prior to *Acton*, the New York City Criminal Court in *People v. Dukes*[37] upheld the use of metal detectors to search all students entering the school, finding that the school had a compelling need for security. The search satisfied the balancing test set forth in *T.L.O.* Similarly, the courts in *In Interest of F. B.* (442 Pa.Super. 216, 658 A.2d 1378, 1995) and *People v. Pruitt* (278 Ill.App.3d 194, 214 Ill. Dec. 974, 662 N.E.2d 540, 1996) upheld handheld and walk-through detector searches (respectively), citing violence in the schools as justification for the searches. All three courts used the reasonableness test established in *T.L.O.* as the standard of legality for the searches.

In *State of Florida v. J.A.*,[38] the Third District Court of Appeals in Florida denied a rehearing on the prior ruling that upheld a public school board's policy authorizing random, suspicionless weapons searches of public high school students. Conducted by an independent security firm, the search was witnessed by a school administrator. The trial judge determined that the search was a police search requiring a standard of probable cause. Citing the New York, Pennsylvania, and Illinois cases,[39] the District Court determined the search to be a random, suspicionless, administrative search with no police involvement; therefore, the appropriate standard was that of *reasonableness*.

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[36] *Id.* at *18-19.
[37] 580 N.Y.S.2d 850 (N.Y. Crim.Ct. 1992)
[38] 679 So.2d 316 (Fla.App. 3 Dist. 1996).
[39] *People v. Dukes*, *In Interest of F.B.*, and *People v. Pruitt*.

Analyzing the search to ascertain whether it complied with the reasonableness standard, the court looked to *Acton* in identifying as the first step the consideration of the nature of the privacy interest upon which the search might intrude. The court acknowledged school officials' power saying, "[B]ecause of the state's custodial and tutorial authority over the student, public school students are subject to a greater degree of control and administrative supervision than is permitted over a free adult."[40] In next looking at the degree of intrusion, the court determined that "the immediacy of the Board's concern for students' safety, and the safety of all school personnel" was justified and that the Board had selected the method it felt would best meet their needs. Again citing Acton, the court stated, "The Supreme Court has never declared that 'only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.' "[41]

The 1996 Pennsylvania case, *In re S.S.*,[42] involved the search of a high school student by a police officer using a metal detector scan and pat down procedure. All students who entered the school on the day of the search were subject to the same search procedure. After removing his coat and placing his book bag on a table, the student was scanned and patted down. The school employee conducting the search detected a bulge in the coat and asked his supervisor, a police lieutenant, to witness a search of the coat pocket. After the search revealed a box cutter, the student was turned over to the police who then arrested him without a warrant, charging him with possession of a weapon on school property.

The student filed a motion to suppress the physical evidence, but the motion was denied. He was found guilty of the charge and placed on probation. His subsequent motion for reconsideration of the verdict and/or post verdict relief was denied. An additional appeal raised

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[40] *Acton*, 115 S.Ct. at 2392
[41] *State of Florida v. J.A.*, 679 So.2d 316 (Fla.App. 3 Dist. 1996), quoting *Acton*, 115 S.Ct. at 2396.
[42] 452 Pa. Super. 15, 680 A.2d 1172 (Pa. Super. 1996).

the question of error on the part of the lower court in denying the motion to suppress physical evidence due to the lack of reasonable suspicion or probable cause for the search.

The Superior Court of Pennsylvania, concluding that the search was an administrative search, held that the appellant's motion to suppress physical evidence had been properly denied. Using *In the Interest of F.B.* as reference, the court noted that "administrative searches are permitted where law enforcement authorities have no individualized suspicion when conducting a search as part of a general regulatory scheme to ensure public safety."[43] All students were searched in the same manner, using a uniform procedure. Stating that "the school's interest in ensuring security and educating its students far outweighs appellant's privacy interest," that court held: "The search, as conducted, was reasonably related to the school's interest in promoting student safety. Because appellant's privacy interests were minimal and safeguards were present, individual suspicion was not necessary before searching appellant and his belongings."[44]

Drug Testing

Relying on the same rationale employed by the U.S. Supreme Court in *Vernonia*, the 7th Circuit in *Todd v. Rush County Schools*[45] (1998) upheld a challenge to a drug testing policy that applied to high school students who participated in any extracurricular activities or drove personal vehicles to and from school. The random, unannounced urinalysis required parental consent. This consent permitted students to participate in extracurricular activities and to drive to school. The parents of William Todd refused to sign the consent; consequently, he was barred from two clubs he desired to join (the Library Club and Future Farmer's of America), and was not allowed to drive to school. Todd and his parents filed suit.

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[43] *Interest of F.B.*, supra at 223, 658 A.2d at 1381 (citing *U.S. v. $124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989)).
[44] *In re S.S.*, 680 A.2d 1172, LEXIS 2136, (1996 Pa.Super.).

Citing *Acton*, the court noted that "deterring drug use by students was a compelling interest"[46] and held that Rush County Schools had implemented their drug testing program in the best interests of its students. Although *Vernonia* involved only student athletes, a condition that court emphasized in looking at the reasonableness of the search, the *Todd* case extended the parameters to include students in *all* extracurricular activities. The court concluded, however, that the search implemented by Rush County Schools was "sufficiently similar" to the programs in *Vernonia* and *Schaill*[47] to "pass muster" in terms of the Fourth Amendment.

The 7th Circuit Court of Appeals in *Willis v. Anderson Community School Corporation*[48] reversed the district court ruling that upheld the suspension of a high school student who refused to submit to the school policy mandating urinalysis for drug and alcohol use of students suspended for fighting. The student, who was suspended twice--the first time for fighting and the second for refusing to submit to the test when he returned--filed suit after being informed that continued refusal would lead to a third suspension pending expulsion proceedings. The district court denied the motion for a preliminary injunction against the school and entered a judgment in the school's favor on the merits of the case, finding the school's search constitutional under the "special needs" inquiry--a context specific inquiry that closely examines the completing private and public interests of the parties involved.

On appeal, the 7th Circuit Court noted that the school policy had been implemented to address concerns about growing disciplinary problems and school officials' perception of increased student drug and alcohol use. Under the policy, students who refused the test were

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[45] 133 F.3d 984 (7th Cir. 1998), *reh'g with suggestion for hearing en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 1998 U.S. LEXIS 4938.
[46] *Id.* at 986.
[47] *Schaill ex rel. Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) involved random urine testing of student athletes. The court upheld testing because of the school's interest in preventing drug-related injuries; student athleters were perceived as role models for other students; the privacy intrusion was perceived to be less due to the physical examinations required of student athletes.

considered to have admitted to unlawful substance use. The school argued a "causal nexus" between illegal substance use and violent behavior, apparently "contending that fighting alone gives rise to a conclusive presumption of reasonable suspicion"[49] that at the same time negated the need for determination of individualized suspicion. The dean of students, however, when questioned about his observation of the student following the fight, testified, "I had nothing at that time that would give me reasonable suspicion, no."[50] This created a paradox in that while school policy presumed reasonable suspicion, the dean testified that he had none. Although the court usually looks at whether individualized suspicion is reasonable, the presumption of reasonable suspicion by school policy would require the court to do a reverse analysis: Was it unreasonable for the dean to conclude that the student's action did not create individualized suspicion? The court said the relationship between illegal substance use and fighting was not conclusive; therefore, the data did not conclusively establish reasonable suspicion, nor was it unreasonable for the dean to conclude that the student's "conduct did not give rise to individualized suspicion."[51]

The required test, however, would still be permissible if it fell within the "special needs" category, and met the requirements thereof, outlined in Vernonia as depending on "the balance between (a) the nature of the individual's privacy interest and the character of the intrusion, and (B) the nature and immediacy of the government's concern, as well as the efficacy of the means for meeting that concern."[52] Noting that the dean's evaluation of the student refuted the school's claim of a "special need," and that a "suspicion-based system could easily address" the school's concern, the appeals court reversed the lower court's ruling.

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[48] 1998 U.S. App. LEXIS 21923 (7th Cir. (Ind.)).
[49] Id. at *6.
[50] ***Id.***
[51] Id. at *11.

Medical Assessment Searches

In 1997 the 7th Circuit Court upheld a "medical assessment" and resultant unsuccessful search of a high school student suspected by a certified drug addiction counselor of being under the influence of marijuana.[53] Smoking violations on at least two occasions landed a freshman student in an after-school smoking cessation program. His behavior during the program, including giggling, acting in an unruly fashion, being distracted, behaving inappropriately, and giving "flippant" answers to questions caused the program coordinator to become suspicious that the student was using marijuana. Following a "medical assessment" by the school nurse, who noted elevated blood pressure and pulse readings as well as dilated pupils yet did not conclude drug influence, the student's garments were searched. The drug test conducted the following day indicated that the student had not been using marijuana. The student, through his mother, filed action against the school and the program coordinator.

Upon reviewing the district court's summary judgment, the 7th Circuit Court reiterated the criteria for school officials to legally conduct the search of a student's person or property: namely justification at inception and reasonableness in scope and circumstance. Applying a *T.L.O.* analysis, the court concluded that the medical assessment and the search of outer clothing were reasonable based on the suspicions given, and that the scope of the search was not excessively intrusive. Although the program coordinator's suspicions of drug use were not entirely substantiated by the school nurse, were disputed in part by the student, and were proven false by the drug test, the search was a legal search. The negative results did not make the search illegal. Because no genuine issue of material fact existed, the court affirmed summary judgment.

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[52] *Id.* at *15, citing *Vernonia v. Acton*, 515 U.S. at 654, 657, 660.
[53] *Bridgman v. New Trier High School District No. 203*, 128 F.3d 1146 (7th Cir. 1997).

Strip Searches

Generally, the *T.L.O.* standard of reasonable suspicion is the best precept to follow when conducting searches of students' personal effects, including purses, backpacks, pockets, and other similar items. In searches that involve items on or about a student's person, the second prong—the scope of the search—is of increasing importance in determining its legality. The degree of intrusiveness of a search increases as the searcher comes closer to the body of the person being searched. Searching an inanimate object (i.e., a student's locker) is the least intrusive. Having students empty their own purses, backpacks, or pockets is less intrusive than having the searcher doing so. The strip search involves the highest degree of intrusiveness.[54]

In the 1991 case, *Williams by Williams v. Ellington*,[55] the 6th Circuit upheld a search of a female student for evidence of drugs or drug use. Acting on tips and other relevant evidence, an assistant principal searched the student's assigned locker and a second locker she had been using; another assistant principal, a female, searched the student's books and purse. Finding no evidence of drugs, the female assistant principal searched the student in the presence of a female secretary; the student was asked to empty her pockets, remove her T-shirt, lower her blue jeans to her knees, and then remove her shoes and socks. No evidence of drugs was found. The student's father lodged a complaint with the school board; the board, believing the search justified, ratified the conduct of the administrators. The student and her father filed suit.

The school district had a district-wide policy "allowing for the search of a pupil's person if there is a reasonable suspicion that the student is concealing evidence of an illegal activity."[56]

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[54] *See* Rossow, L. F. & Hininger, J. A. (1991). "Students and the law" (Fastback Series No. 317). Louisville, Kentucky: Phi Delta Kappa; and Russo, C. J. & Stefkovich, J. A. (1998, September). "Search and Seizure in the Schools." 82 NASSP Bulletin 26. On a continuum of least to most intrusive searches, the strip search is potentially the most intrusive. Greater justification, (i.e. a search for drugs or weapons) is required for such searches to be considered reasonable. Nonetheless, the reasonableness of any search is based on its individual circumstances.

[55] 936 F.2d 881 (6th Cir. 1991).

[56] *Id.* at 884.

The court noted that the policy followed the criteria set forth in *T.L.O.*, even to exactness of language. The board itself was immune from suit; their action in ratifying the search could not be viewed as part of the alleged constitutional deprivation.

In reaching its decision, the court stated:

> A diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action. A thorough review of *T.L.O.* reveals that the Court was careful to protect a school official's right to make discretionary decisions in light of the knowledge and experience of the educator and the information presented to him or her at the time such decision was made.[57]

Pointing out that "some tips, though unverified, are reliable,"[58] the court in this case considered the tips the principal received to be part of the "totality-of-the-circumstances"[59] inquiry requisite in both reasonable suspicion and probable cause standards. The court held that the actions of the administrators were "not unreasonable," and that they, as individuals, were qualifiedly immune. Noting that courts have been "virtually silent" in defining the Fourth Amendment rights of students "clearly established" by the Supreme Court, they stated, "[I]n light of existing case law to guide Defendants, the search was not unreasonable at its inception." Nor was the scope unreasonable, given the particular circumstances. Because the law was not clearly established, the principal was granted qualified immunity.

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[57] *Id.* at 886.
[58] *Id.* at 889.
[59] *Id.* at 888.

The 1993 *Cornfield*[60] case involved a strip search of a 16-year-old male student suspected of "crotching" drugs. The search, conducted in the privacy of the boys' locker room, occurred after the student was found outside the school building in violation of school rules. The teacher's aide who reported the violation described an unusual bulge in the student's crotch area; two other faculty members corroborated the observation. After two male faculty members observed the bulge, the student was searched. Judging a pat down search to be "excessively intrusive and ineffective at detecting drugs,"[61] the men escorted the student to the boys' locker room. The door was locked and the two men stood on either side of the student, fifteen and ten to twelve feet away. The student removed his street clothes and put on a gym uniform. The men visually inspected the student's naked body and physically inspected his clothes. No drugs were found; subsequently, the student and his mother filed suit.

The district court granted summary judgment to the defendants; the 7th Circuit affirmed the decision. In its concurrence with the district court, the circuit court reiterated the precept that "whether a search is 'reasonable' in the constitutional sense will vary according to the context of the search." Using examples, the court illustrated the meaning of its assertion: "A nude search of a student by an administrator or teacher of the opposite sex would obviously violate this standard. Moreover, a highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*"[62] On this sliding scale, as the intrusiveness of the search intensifies, the reasonableness standard of the Fourth Amendment correspondingly intensifies. "Thus, this flexible standard allows a school administrator or court to weigh the interest of a school in maintaining order against the

[60] *Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d. 1316 (7th Cir. 1993).
[61] *Id.* at 1319.
[62] *Id.* at 1320.

substantial privacy interests of students in their bodies."[63] Noting the circumstances and seriousness of the alleged offense, the court found that the school officials' conclusion "that a strip search was the least intrusive way to confirm or deny their suspicions was not unreasonable."[64]

The case of *Jenkins v. Talledega City Board of Education*[65] involved the search of two eight-year-old second grade girls for $7.00 missing from a classmate's purse. Testimony in the case produced conflicting information regarding the search; however, there was agreement that both girls were taken to the restroom and asked to remove their clothes. No money was found. Parents of the girls subsequently filed a complaint.

The court concluded that at the time of the events, the law pertaining to the Fourth Amendment was not developed to the extent that the educators involved should have known their conduct was constitutionally impermissible. Accordingly, the court affirmed the summary judgment of the lower court based on grounds of qualified immunity. That the defendants "likely exercised questionable judgment given the circumstances"[66] was noted, although the court declined to debate the prudence of the their conduct.

Recently, in *Kennedy v. Dexter Consolidated Schools,*[67] the New Mexico Court of Appeals held that strip searches of two students, one male and one female, for a missing ring was unconstitutional because the searches were performed without individualized reasonable suspicion. Returning to her desk after retrieving a graded paper, one of eleven students in the computer class was unable to find her diamond ring on the computer console where she had placed it. When she reported the loss to the teacher, he and the students searched for the lost

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[63] *Id.* p.1321.
[64] *Id.* at 1323.
[65] 115 F.3d 821 (*en banc*) (11th Cir. 1997), *cert. denied* 1997 U.S. LEXIS 6726.
[66] *Id.* at 828.

ring. The ring was not found, so the principal was called in. After consulting the school policy manual, he spoke to the students and gave them opportunity to return the ring anonymously by leaving the ring on the table while the lights were turned out. Again, the ring was not found. The principal then interviewed each student individually in his office; however, the ring still was not found. Following this, the students, all 14 and 15 years of age, were individually strip searched in the school restrooms by school personnel. Subsequently, two students filed suit claiming violations of their civil rights. After a jury trial, the district court entered judgment against the defendants; the students were awarded compensatory and punitive damages.

The appeals court affirmed judgment against the school district. Looking to prior cases, the court noted that there were "surprisingly few post-*T.L.O.* reported decisions regarding strip searches," and that those few opinions "do not address whether individualized suspicion is necessary."[68] Conversely, "the decisions finding strip searches to be unconstitutional do not appear to rely on the absence of individualized suspicion."[69] Citing the Ninth Circuit Court of Appeals strip search standard of whether "the suspect is forced to disrobe to a state which would be offensive to the average person,"[70] the court reasoned that "the test in the case before us would be what is offensive to the average student of the age and sex in question."[71] Considering the age of the students involved in this case, the court believed the intrusiveness of the search "sufficiently offensive" to require at least individualized reasonable suspicion. Significantly, the court noted that they did not address "the standard imposed on school searches when there is a grave, imminent danger to health or safety."[72]

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[67] *Kennedy v. Dexter Consolidated Schools*, 955 P.2d 693, 1998 N.M. App. LEXIS 23 (N.M. App. 1998).
[68] *Id.* 1998 N.M. App. LEXIS at *12.
[69] *Id.*
[70] *Id.* at *16, quoting *United States v. Chase*, 503 F.2d 571, 574 (9th Cir. 1974).
[71] Kennedy v. Dexter Consolidated Schools, 955 P.2d 693, LEXIS 23 (N.M. App. 1998).
[72] Id at *17.

Summary

Although the issue of individualized suspicion as a requirement for school searches was left open in the sentinel *T.L.O.* case, the Court in *Acton* moved toward a clarification of that issue. Noting that the Fourth Amendment does not require that the "least intrusive" search be conducted, the Court weighed the nature and immediacy of the concern at issue in favor of a finding of reasonableness. Considering the students' right of privacy versus the school officials' need to maintain order and discipline and provide for the safety of their students, as well as the procedures involved, the Court upheld the search.

The *Thompson, Smith, and DesRoches* cases demonstrate the view courts in general hold in regard to the authority of school officials. Although each case was unique in circumstances, the need to maintain safety and order in schools was clearly recognized. The *DesRoches* case presented an added twist to consideration of mass searches in that the court saw not one search of 19 students, but rather 19 individual searches. The court in *Smith v. McGlothlin* clearly emphasized the authority of school officials, a point of contention for Justice O'Connor, who in her *Acton* dissent wrote:

> . . . although children may have had fewer rights against the private schoolmaster at the time of the framing [of the *Constitution*], than they have against public school officials today, *parents* plainly had *greater* rights then than now. At the time of the framing, for example, the fact that a child's parents refused to authorize a private schoolmaster's search of the child would probably have rendered any such search unlawful; after all, at common law, the source of the schoolmaster's authority over a child was a delegation of the parent's authority. Today, of course, the fact that a child's parents refuse to authorize

a public school search of the child--as James Acton's parents refused here--is of little constitutional moment.[73]

Similarly, the courts in *People v. Dukes, In re F. B., People v. Pruitt, State of Florida v. J.A.*, and *In re S. S.* found the safety concerns of school officials preeminent in determining the reasonableness of the random, suspicionless searches. The *In re S. S.* court specifically noted the uniform procedure of the search that served to safeguard individual privacy rights; the justification of the search as administrative by the high rate of violence in the schools; and the school's interest in promoting student safety. The court stated, "Under the circumstances, the school's interest in ensuring security and educating its students far outweighs appellant's privacy interest."[74]

Although the 7th Circuit in *Todd v. Rush County Schools* seemingly broadened the permissibility of student drug testing by extending the testing parameters to all extracurricular school activities,[75] some limitations on school authority were implied in *Willis v. Anderson Community School Corporation.* Noting the need to "carefully examine" the group affected by the testing policy, the court said, "For one insidious means toward blanket testing is to divide students into several broad categories ('extracurricular-ites,' troublemakers, etc.) and then sanction drug testing on a category-by-category basis. Eventually all but the most withdrawn and uninvolved students will fall within a category that is subject to testing."[76]

Strip searches continue to demand the courts' most careful scrutiny. School officials conducting searches for drugs or weapons such as those in *Williams by Williams v. Ellington* or

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[73] *Vernonia v. Acton,* 515 U.S. 646, See Justice O'Connor's dissent, explanatory note #1.
[74] *In re S. S.*, 680 A.2d 1172, 1996 Pa. Super, LEXIS 2136 at *11.
[75] In contrast, the searches in *Vernonia* and *Schaill* were restricted to student athletes.
[76] 1998 U.S. App. LEXIS 21923 at *22. The court continued in this vein by pointing out that data used by the school in this case drew a relationship between these "withdrawn and uninvolved" students and drug and alcohol use, so one could not assume that schools would not also target these students, thereby, in effect, sanctioning blanket searches.

Cornfield appear to be given more latitude than are those searching for personal possessions such as in *Kennedy v. Dexter*. The standard of paramount importance appears once again to be the school's need to guard the safety and well being of its students.

Conclusions

Clearly, the pendulum of students' Fourth Amendment rights has swung to favor school officials' actions, based largely on the governmental interest prong of the *Acton* rationale. As state actors, school officials have temporary custody of their students, thereby delegating to them not only the responsibility to provide for the safety and well-being of those students, but also granting them a greater degree of control over them. Weighing the students' individual rights to privacy against the "nature and immediacy" of the governmental concern at issue, and the efficacy of the means for meeting it, school officials must make the crucial decisions regarding whether or not and how to conduct a search. Although court decisions show a proclivity to support administrators, informed decision making remains paramount in conducting student searches.

Practical Considerations

Although the scales appear to be tipped in their favor, school officials will be wise to adhere to the following guidelines:

- Articulate students' "expectations of privacy" in school policy.
- Observe the "reasonableness" standard for every search:
    - The search must be justified at its inception. (Do I have reasonable suspicion?)
    - The search must be reasonable in scope. (What am I looking for? Where can I expect to find it?)
- Have another staff member present when conducting a search

- Have a member of the same gender as the person being searched conduct the search.
- Avoid strip searches.
- If police are involved (either in conducting a search or asking you to conduct a search to uncover evidence of criminal wrongdoing pursuant to an investigation), probable cause is the safest standard.

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